No. 95-1790

# In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 204, AFL-CIO AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,
PETITIONERS

*v.*

LUNDY PACKING COMPANY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF THE PETITION

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## QUESTION PRESENTED

Whether the court of appeals' refusal to permit the National Labor Relations Board to count the challenged ballots of the employees whose exclusion from a bargaining unit was the sole ground for the court's denying enforcement of an unfair labor practice order based on a presumptively valid secret ballot election so exceeded the scope of its reviewing authority under the National Labor Relations Act and so departed from the accepted and usual course of judicial proceedings as to warrant summary reversal.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) denying enforcement of the order entered by the National Labor Relations Board (Board) in the unfair labor practice proceeding is reported at 68 F.3d 1577. The subsequent orders of the court relevant to the petition (Pet. App. 22a-28a) are unreported. The decision of the Board in the representation proceeding certifying the results of the election (Pet. App. 37a-50a) is reported at 314 N.L.R.B. 1042. The order of the Board finding an unfair labor practice

based upon its certification of the election (Pet. App. 29a-36a) is listed in the Board's records as 315 N.L.R.B. No. 159 but is not yet reported. The subsequent orders of the Board relevant to the petition (Pet. App. 14a-21a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on November 3, 1995. A petition for rehearing was denied on January 2, 1996. Pet. App. 12a. On March 25, 1996, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 1, 1996. The petition was filed on May 1 and docketed on May 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. Respondent Lundy Packing Company (Lundy) operates a pork products plant in Clinton, North Carolina, that employs about 880 workers. In March 1993, two unions—the United Food and Com-mercial Workers and the International Union of Operating Engineers (collectively, the Union)—filed a petition with the Acting Regional Director of the National Labor Relations Board (Board) pursuant to Section 9(c) of the National Labor Relations Act (Act), 29 U.S.C. 159(c), seeking jointly to represent a bargaining unit composed of specified production and maintenance employees of Lundy.[1] Lundy and the

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[1] Section 9(c) of the Act, 29 U.S.C. 159(c), provides in relevant part:

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> —
>
> (A) by * * * any * * * labor organization acting in [the employees'] behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, * * *
>
> * * * * *
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.



Union disagreed over the appropriate composition of the bargaining unit in which to hold a representation election.[2] Lundy proposed a "wall-to-wall unit"—*i.e.*, a unit consisting of all of its employees—whereas the Union proposed a unit excluding approximately 213 employees. Pet. App. 2a.

In May 1993, after a hearing, the Acting Regional Director determined that the appropriate bargaining unit was the unit proposed by the Union, with some additions, and scheduled an election in that unit.

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[2] Section 9(a) of the Act, 29 U.S.C. 159(a), provides in relevant part that the "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." Section 9(b) of the Act, 29 U.S.C. 159(b), authorizes the Board to "decide in each case * * * the unit appropriate for the purposes of collective bargaining."

Lundy requested pre-election review of that determination by the Board. The Board directed that its "challenged ballot" procedure be used for employees in certain job classifications that Lundy wanted included in, but that the Union wanted excluded from, the unit. Pet. App. 2a-3a, 51a-52a. Under that procedure, when a representation election is held in a bargaining unit the composition of which is disputed, employees in the disputed job classifications cast a secret ballot for or against the Union, and their ballots are impounded. Thereafter, if the impounded, or "challenged," ballots are sufficient in number to affect the results of the election, an investigation is conducted; a hearing is held, if necessary; and a decision is made on whether the challenged ballots should be opened and counted. 29 C.F.R. 102.69(a), (b), (c), and (g); NLRB Casehandling Manual (Part Two) Representation Proceedings §§ 11338, 11344 (1989).

In June 1993, the election was held. The Union won by a vote of 318 to 309. That vote did not, however, reflect 24 challenged ballots, which were sufficient in number to change the outcome. Pet. App. 3a, 38a. In July 1993, after an administrative investigation, the Regional Director issued a decision ordering that certain challenged ballots—including those of nine quality control employees and three industrial engineers—be opened and counted. *Id.* at 38a & n.2, 47a. On the Union's appeal of that decision, the Board reversed, holding that those 12 employees were not properly included in the bargaining unit. *Id.* at 3a, 38a-47a, 49a-50a. The exclusion of those 12 employees, together with the exclusion of four other employees whose status was not questioned before the Board (*id.* at 38a n.2), left the Union's 318 to 309 majority intact, since the eight remaining challenged ballots (of the



original 24) were too few in number to change the election outcome. In September 1994, the Board certified the Union pursuant to Section 9(c) of the Act (29 U.S.C. 159(c), note 1, *supra*) as the exclusive bargaining representative of the bargaining unit in which the election had been held. Pet. App. 48a-49a.

b. Thereafter, Lundy refused to bargain with the Union, prompting the Union to file unfair labor practice charges. Pet. App. 3a. The Board's General Counsel issued a complaint alleging that Lundy's refusal to bargain violated Sections 8(a)(1) and 8(a)(5) of the Act. Pet. App. 29a.[3] In defending against the unfair labor practice charge, Lundy contended, *inter alia*, that the Board had erred in determining the scope of the appropriate bargaining unit. See *id.* at 30a. The Board granted summary judgment for the General Counsel and entered an order that, *inter alia*, re-quired Lundy to bargain with the Union. *Id.* at 33a-34a.

2. Upon Lundy's refusal to comply with the Board's bargaining order, the Board applied for enforcement of that order in the United States Court of Appeals for the Fourth Circuit. The court's jurisdiction was predicated on Sections 10(e) and 9(d) of the

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[3] Section 8(a) of the Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Act, 29 U.S.C. 160(e) and 159(d), which authorize judicial review of an unfair labor practice order that is based upon the facts certified in a representation proceeding.

The court of appeals denied enforcement of the Board's order. Pet. App. 1a-11a. It held that the Board had improperly excluded the nine quality control employees and the three industrial engineers from the bargaining unit. *Id.* at 1a-2a, 6a n.1. The court determined that, in excluding those 12 employees, the Board had given undue weight to the Union's preference as to the appropriate bargaining unit, in contravention of Section 9(c)(5) of the Act.[4] The court concluded its opinion by stating (Pet. App. 11a):

> We do not reach respondent's other assignments of error. For the foregoing reasons, we deny enforcement of the Board's order.
>
> ENFORCEMENT DENIED.

The Union petitioned for rehearing, urging the court to remand the case to permit the Board to provide a further explanation of its exclusion of the twelve employees. The Board, however, decided not to seek rehearing but instead to resume the processing of the representation case in accordance with the court's decision. Accordingly, following the denial of the Union's petition for rehearing on January 2, 1996, and the issuance of the court's mandate on January 10, 1996, the Board issued an order on February 6,

[4] Section 9(c)(5), 29 U.S.C. 159(c)(5), provides that, when the Board determines whether a bargaining unit is appropriate for purposes of collective bargaining, "the extent to which the employees have organized shall not be controlling."



1996, as amended on February 9, 1996, remanding the representation case to the Regional Director to determine the proper disposition of the challenged ballots. Pet. App. 12a-18a.

On February 9, 1996, the Regional Director gave notice that, on February 16, 1996, 14 challenged ballots would be opened and counted—those of the nine quality control and three industrial engineer employees that the court held had been improperly excluded from the unit, plus two other employees (the waste management operator and the finished product loader/cleaner) whom the Board had previously found eligible for inclusion in the bargaining unit but whose ballots had not been opened because they would not have changed the election outcome. Pet. App. 19a-21a, 38a n.2.

3. Lundy sought contempt sanctions and a writ of mandamus in the court of appeals, contending that the Board had no authority to take any further action in the representation case. See Pet. App. 24a. In an order dated February 15, 1996, the court denied mandamus and declined to hold the Board in contempt but expressed agreement with Lundy's position. *Id.* at 22a-25a. The court stated that its decision to deny enforcement of the bargaining order, without remanding the case to the Board, "terminat[ed] all administrative proceedings relating to the case" (*id.* at 23a), and that "the attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction" (*id.* at 24a). The Board moved for reconsideration of the court's order.

In a second order, dated March 21, 1996, the court of appeals denied reconsideration and reiterated its view that, in the absence of a remand, the Board lacked

authority to open and count the ballots of the 12 employees whom, the court had held, should have been included in the bargaining unit. Pet. App. 26a-28a. In addition, the court suggested for the first time that its refusal to enforce the Board's bargaining order may not have been based solely on the Board's exclusion of the 12 employees.[5] The court stated (*id.* at 27a):

> Numerous problems inhered in the conduct of this particular election: (1) the manner in which two separate representation campaigns were consolidated; (2) the determination of the bargaining unit; (3) the evidence of election misconduct (electioneering, intimidation, and the failure to accommodate Spanish-speaking voters); and (4) the Board's unexplained delay in issuing its decision on the challenged ballots. As a result, in *N.L.R.B.* v. *Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), this court denied enforcement of the Board's bargaining order *outright*, disposing of the petition on the basis of the Board's improper bargaining unit determination.

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[5] In its opinion of November 3, 1995, the court addressed only the exclusion from the bargaining unit of the nine quality control employees and three industrial engineers and stated that it "d[id] not reach respondent's other assignments of error." Pet. App. 11a; see also *id.* at 23a ("In [the November 3 opinion], this court addressed the Board's bargaining unit determination for a production and maintenance unit at Lundy Packing Company's Clinton, North Carolina facility. In that case, we denied the Board's request to enforce its bargaining order against Lundy.").



## ARGUMENT

Under the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.*, the National Labor Relations Board (Board) is entitled to resume processing a representation proceeding after a court has refused to enforce an unfair labor practice order that is based on facts certified in that proceeding, regardless of whether the court has remanded the case to the Board. The justification for that statutory scheme is illustrated with unusual clarity in this case. The court of appeals refused to enforce a bargaining order based on a Board-supervised election involving more than 600 unit employees solely on the ground that the Board had improperly excluded 12 employees from the bargaining unit. The logical and legally appropriate remedy for the improper exclusion of those employees was to include them; the Board accordingly proposed to open and count the votes of those employees, which had been cast, but not previously opened or counted, pursuant to the Board's well-established "challenged ballot" procedure. By erroneously refusing to allow the Board to tabulate the challenged ballots, the court of appeals nullified the exercise by more than 600 employees of their right under the Act to choose their bargaining representative or to refrain from doing so. See 29 U.S.C. 157. The court's error is so clear that summary reversal is appropriate.

The Board did not itself petition for a writ of certiorari because the court of appeals' decision does not necessarily require any change in the Board's procedures in representation cases. The court's misperception that the Board's action in this case was "unusual" and an attempt to "bypass [the] court" (Pet. App. 27a) suggested that the problem might be

avoided in future cases if the court were made aware that, when a court denies enforcement of a bargaining order based on an election, the Board routinely resumes processing the representation case in accordance with the court's decision denying enforcement.[6] The court's orders prohibiting the Board from taking that action could nevertheless create uncertainty about the Board's authority in that situation. Moreover, as noted above, the court's action erroneously deprives private parties of their statutory rights, and the error is clear. We therefore support the petition for summary reversal.

1. It has long been settled that federal courts ordinarily cannot directly review the Board's exercise of its authority under Section 9(c) of the Act to investigate representation disputes, conduct representation elections, and certify the results of such elections. *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964); *NLRB* v. *Falk Corp.*, 308 U.S. 453 (1940). The Court has recognized an exception to that principle only in "extraordinary circumstances" (*Boire*, 376 U.S. at 479), when the Board has exceeded its delegated powers and violated a clear and mandatory prohibition that could not, in the absence of direct review, be enforced at the instance of the party who is the intended beneficiary of the prohibition. See *Leedom* v. *Kyne*, 358 U.S. 184, 188-191 (1958); see also *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963). Apart from that exception, which does not apply here, Congress has authorized only an "indirect method of obtaining judicial review" of the Board's rulings in

[6] See, *e.g.*, *Medina County Publications*, 274 N.L.R.B. 873 (1985); *Deming Div., Crane Co.*, 225 N.L.R.B. 657, 657 n.3 (1976).



representation proceedings. *Boire*, 376 U.S. at 477. Under that method, review is available only to the extent that the representation proceeding provides the basis for an unfair labor practice order. See *id.* at 477-479; *AFL* v. *NLRB*, 308 U.S. 401, 410 & n.3 (1940). The court of appeals in this case plainly overstepped the statutory limits on judicial review applicable in that context.

Section 10(e) and (f) authorize judicial review of an unfair labor practice order upon a petition for enforcement filed by the Board or upon a petition for review filed by any person aggrieved by the order. 29 U.S.C. 160(e) and (f). Section 9(d) of the Act applies when, as here, the unfair labor practice order is "based in whole or in part upon facts certified following an investigation pursuant to" Section 9(c) of the Act. 29 U.S.C. 159(d); see also *Boire*, 376 U.S. at 477. Section 9(d) states in relevant part:

> [S]uch certification and the record of [the] investigation [in the representation proceeding] shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The "order of the Board" referred to in Section 9(d) is the order entered in the unfair labor practice proceeding as a remedy for an employer's refusal to bargain with the certified representative. The certification and the record of the investigation in the representation proceeding are made part of the record before the court only in order to facilitate review of

the unfair labor practice order. Section 9(d) limits the actions that a court can take to actions affecting that order; the court may "enforc[e], modify[], or set[] aside in whole or in part the order." 29 U.S.C. 159(d). Section 9(d) does not give the court of appeals general authority over the underlying representation proceeding.

The court of appeals in this case plainly exceeded its authority under Section 9(d) in prohibiting the Board from opening and counting the ballots of the employees that, the court held, were improperly excluded from the bargaining unit. The court's authority was limited to reviewing the unfair labor practice order requiring Lundy to bargain with the Union. Of course, that authority necessarily encompassed the authority to review the legal and factual determinations underlying the order. Thus, it was proper for the court to review the Board's determination of the appropriate bargaining unit in which to hold the election on the basis of which the Union was certified as the exclusive bargaining representative. Here, however, the court of appeals went beyond reviewing the determinations made by the Board in the representation proceeding. It asserted control over the Board's conduct of the representation proceeding itself, by purporting to "terminat[e] all administrative proceedings relating to the case." Pet. App. 23a.

To be sure, a court's decision denying enforcement of an unfair labor practice order based on a representation proceeding may affect the Board's future conduct of that proceeding. The court's decision in this case precluded the Board from holding a new election in a unit that excluded the 12 employees that, the court held, should be included in the unit. In



other cases, a court's decision could conclusively determine the validity of a prior election. That would be true, for example, if a court upheld an employer's objections to the validity of the election[7] or determined that the Board had erred in voiding a vote against the union that, if counted, would make a union majority arithmetically impossible.[8] Even if a court denies enforcement of an order on the ground that the election was invalid, however, its decision does not terminate the representation proceeding, as the court in this case believed (Pet. App. 23a). The Board retains the authority, for example, to direct a new election upon the previously filed election petition in a bargaining unit that is consistent with the court's decision.[9]

Moreover, it bears emphasis that the court's decision in this case did *not* find the election invalid. Compare *ITT Lighting Fixtures* v. *NLRB*, 718 F.2d 201 (2d Cir. 1983) (collecting cases in which reviewing courts both denied enforcement and set aside the election). The court held that the Board had erred in determining the bargaining unit, but the court

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[7] *E.g.*, *KI (USA) Corp.* v. *NLRB*, 35 F.3d 256 (6th Cir. 1994); *NLRB* v. *Carroll Contracting & Ready-Mix*, 636 F.2d 111 (5th Cir. 1981); *Summa Corp.* v. *NLRB*, 625 F.2d 293, 295-296 (9th Cir. 1980); *NLRB* v. *Producers Cooperative Ass'n*, 457 F.2d 1121, 1126-1127 (10th Cir. 1972).

[8] See, *e.g.*, *NLRB* v. *Wrape Forest Industries, Inc.*, 596 F.2d 817, 818 (8th Cir. 1979); *NLRB* v. *Tobacco Processors, Inc.*, 456 F.2d 248 (4th Cir. 1972).

[9] See *KI (USA) Corp.*, 316 N.L.R.B. 1038 (1995) (directing a second election following the denial of enforcement of the Board's bargaining order based on the initial election); *Medina County Publications*, 274 N.L.R.B. 873 (1985) (same); *A.G. Parrott Co.*, 255 N.L.R.B. 259 (1981) (same).

expressly refrained from ruling on Lundy's other assignments of error. Pet. App. 11a. The court's holding regarding the appropriate bargaining unit did not impugn the election, especially since the employees that were held to have been improperly excluded from the unit were permitted to vote.[10] The court's holding merely required that those employees be included in the bargaining unit and that their votes be counted in any representation election in the unit.

In sum, neither the court's refusal to enforce the bargaining order nor the court's reason for that refusal precluded the Board from tabulating the votes of the excluded employees pursuant to its long-established "challenged ballot" procedure. Accordingly, the Board's authority to tabulate those votes did not depend on the court's remanding the case to the Board.[11]

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[10] Because the challenged vote procedure provided a record of the excluded employees' wishes regarding representation, this is not a case in which a prohibition on further proceedings could be justified on equitable grounds such as fading memories, unavailable witnesses, or the additional passage of time and employee turnover that would accompany further proceedings on remand. See *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087, 1094-1095 (7th Cir. 1984); *NLRB* v. *Katz*, 701 F.2d 703, 709 (7th Cir. 1983); *Mosey Mfg. Co.* v. *NLRB*, 701 F.2d 610 (7th Cir. 1983) (en banc); *NLRB* v. *Connecticut Foundry Co.*, 688 F.2d 871 (2d Cir. 1982); *NLRB* v. *Nixon Gear, Inc.*, 649 F.2d 906 (2d Cir. 1981); cf. *NLRB* v. *Hub Plastics, Inc.*, 52 F.3d 608, 614-615 (6th Cir. 1995); *Kusan Mfg. Co.* v. *NLRB*, 749 F.2d 362, 366 (6th Cir. 1984).

[11] None of the decisions cited by the court of appeals (Pet. App. 23a-24a) for the contrary proposition involved judicial review under Section 9(d) of the Act, and thus none addresses the Board's authority to resume the processing of a representation case after a court denies enforcement of an unfair labor practice order based on facts certified in the representation case. In *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-344 (1945), cited at Pet. App. 23a, this Court held that, after the court of appeals had enforced a remedial order entered by the Board in an unfair labor practice proceeding, the Board was not entitled, in the absence of fraud or mistake, to have the court's enforcement order vacated so that the Board could enter a new remedial order that, in retrospect, it decided was more appropriate. Similarly, in *W.L. Miller Co.* v. *NLRB*, 988 F.2d 834, 836-838 (8th Cir. 1993), cited at Pet. App. 24a, the court held that, after it had enforced a remedial order against an employer entered by the Board in an unfair labor practice proceeding, the Board lacked authority to reopen the proceeding in order to award additional relief against the employer. In *George Banta Co.* v. *NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982), cert. denied, 460 U.S. 1082 (1983), cited at Pet. App. 23a, the court *rejected* an employer's argument that the Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was pending in a court of appeals. Finally, in *Service Employees Int'l Union Local 250* v. *NLRB*, 640 F.2d 1042, 1044-1045 (9th Cir. 1981), cited at Pet. App. 23a, the court, applying the doctrine of res judicata, upheld the Board's conclusion that it lacked jurisdiction to adjudicate a union's claim that an employer had committed an unfair labor practice, when the same claim had been implicitly rejected in an earlier court of appeals decision involving the same facts.



2. Even if it is assumed that a remand from the court was required for the Board to tabulate the votes of the improperly excluded employees, the court of appeals' failure to remand the case to the Board so far departed from the accepted and usual course of judicial proceedings as to warrant summary reversal.

This Court has repeatedly stated, including in cases involving the Board, that "[w]hen an administrative agency has made an error of law, the duty of

the court is to 'correct the error of law committed by that body, and after doing so to remand the case to the [agency].'" *NLRB* v. *Pipefitters*, 429 U.S. 507, 522 n.9 (1977) (quoting *ICC* v. *Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901)); accord *South Prairie Constr. Co.* v. *Operating Engineers Local 627*, 425 U.S. 800, 803-806 (1976) (per curiam); *NLRB* v. *Food Store Employees*, 417 U.S. 1, 8-10 (1974). The court's duty to remand a case following a determination of agency error preserves the agency's authority to "enforc[e] the legislative policy committed to its charge" using the agency's own procedures. *South Prairie Constr.*, 425 U.S. at 806 (quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940)); see also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-525, 543-544, 549 (1978).

As this Court has stated in a context similar to the present one, "the function of the Court of Appeals ended when the Board's error on the [bargaining unit] issue was 'laid bare.'" *South Prairie Constr.*, 425 U.S. at 805-806 (quoting *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952)).[12] By failing thereafter to remand

[12] In *South Prairie Constr.*, upon charges filed by a union, an unfair labor practice complaint issued alleging that a company was obligated to bargain with the union pursuant to a collective bargaining agreement with a second company, because the two companies constituted a single employer for collective bargaining purposes. 425 U.S. at 801. The Board dismissed the complaint based on its determination that the companies were separate employers. *Id.* at 802. On the union's petition for review, the court of appeals held not only that the Board's resolution of the "employer" issue was incorrect but also that the appropriate bargaining unit was one comprising the employees of both companies. *Id.* at 802-803. This Court agreed with the company and the Board that "the Court of Appeals invaded the statutory province of the Board when it proceeded to decide the § 9 'unit' question in the first instance, instead of remanding the case to the Board so that it could make the initial determination." *Id.* at 803; see also *id.* at 803-806.



the case to allow the Board to resume the processing of the representation case, the court "invaded the statutory province of the Board." *South Prairie Constr.*, 425 U.S. at 803. The Board long ago made the determination, which this Court has upheld, that secret ballot elections are the preferred means for enabling employees to exercise their statutory right to choose a bargaining representative or refrain from doing so. *Linden Lumber Div., Summer & Co.* v. *NLRB*, 419 U.S. 301, 304 (1974); see also 29 U.S.C. 157. In Board elections, as in political elections, the challenged ballot procedure is a well-established means for allowing disputes about voting eligibility to be resolved in an orderly fashion (while minimizing disclosures that might compromise ballot secrecy). See *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 329-333 (1946).[13] The court prevented the Board from following the procedure that it has developed, in the exercise of its delegated authority, for facilitating employee free choice.

[13] See, *e.g.*, *Browning Ferris, Inc.*, 275 N.L.R.B. 292 (1985) (remanding to open and count challenged ballots of employees whose eligibility had been resolved and to issue an appropriate certification of the results of the election); *Lindberg Heat Treating Co.*, 245 N.L.R.B. 1133 (1979) (remanding to open and count the challenged ballot of an employee wrongfully excluded from the bargaining unit, to prepare a revised tally of ballots, and either to certify the outcome of the election if that ballot is determinative or, if not, to conduct a hearing to decide the validity of the remaining challenged ballot).

The court's action was not justified by the remark in its order of March 21, 1996, that "[n]umerous problems inhered in the conduct of this particular election." Pet. App. 27a. As discussed above, the court's opinion of November 3, 1995, denying enforcement of the bargaining order, addressed only one of the purported "problems": the Board's exclusion of 12 employees from the bargaining unit. The other three "problems" cited in the March 21 order—the consolidation of two separate union representation campaigns; alleged election misconduct; and the Board's allegedly undue delay in issuing a decision on the challenged ballots—were indeed before the court, having been asserted by Lundy in opposing enforcement of the Board's order. But the court expressly refrained in its November 3 opinion from addressing those other "assignments of error" (which the Board had contested). *Id.* at 11a. Thus, the court's subsequent suggestion on March 21 that the denial of enforcement occurred "[a]s a result" (*id.* at 27a) of those asserted errors is inaccurate. More fundamentally, the court's apparent assumption that Lundy's assertions had merit contravened the well-settled principle that a Board-supervised election is presumed to reflect the true desires of the employees and that the burden is on the challenger to show otherwise. See, *e.g.*, *NLRB* v. *Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir. 1965); *Liberal Market, Inc.*, 108 N.L.R.B. 1481, 1482 (1954). The court's disregard of that principle provides a basis for summary reversal. See *NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 123-124 (1961).[14]

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[14] In *Mattison Machine Works*, the court of appeals refused to enforce an unfair labor practice order based on a representation proceeding "because the Board's notices of election contained a minor and unconfusing mistake." 365 U.S. at 123. This Court summarily reversed the court of appeals' decision, holding that "[i]t was well within the Board's province to find * * * that this occurrence had not affected the fairness of the representation election, particularly in the absence of any contrary showing by the employer, upon whom the burden of proof rested in this respect." *Id.* at 123-124.



Nor was the court of appeals' action justified by the fact, upon which the court relied (Pet. App. 23a, 27a), that the Board did not request a remand. For reasons discussed in Point 1, *supra*, a remand was not necessary for the Board to tabulate the challenged ballots of the improperly excluded employees. Moreover, if the court of appeals believed otherwise, it should have remanded the case on its own motion[15] or solicited the views of the parties on the proper disposition of the case. Although the court suggested that it was unfairly surprised by the Board's announcement of an intent to tabulate the challenged ballots (*id.* at 23a), the Board's proposal to do so should have come as no surprise. The whole purpose of the Board's well-established challenged ballot procedure is to avoid having to scrap the results of an entire election merely because of a few challenged votes, which even when counted might not alter the outcome of the election.[16]

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[15] See, *e.g.*, *NLRB* v. *Winnebago Television Corp.*, 75 F.3d 1208, 1212-1213, 1217 (7th Cir. 1996); *Kinney Drugs, Inc.* v. *NLRB*, 74 F.3d 1419, 1436-1437 (2d Cir. 1996); *National Posters, Inc.* v. *NLRB*, 720 F.2d 1358 (4th Cir. 1983); see also *NLRB* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965) (Douglas, J., dissenting) (noting that the Court had ordered a remand without any request from the parties).

[16] The court compounds its error by suggesting in its March 21 order that a timely remand request would have

Moreover, the court of appeals' reliance on the Board's failure to request a remand improperly penalizes employees for the perceived shortcomings of the Board. See *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962); *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-266 (1969); *NLRB* v. *Hub Plastics, Inc.*, 52 F.3d 608, 614 (6th Cir. 1995). Rank-and-file employees are entitled to look to the Board for the protection of their voting rights. *Shoreline Enterprises of America, Inc.* v. *NLRB*, 262 F.2d 933, 944-946 (5th Cir. 1959). The Board's use of the challenged ballot procedure in this case reflected an effort to protect the voting rights of the more than 600 production and maintenance employees of Lundy who participated in the election. Once the court of appeals held that 12 of those employees were improperly excluded from the unit, the unit employees could reasonably look to the

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enabled the court in its initial opinion "to inquire in an orderly fashion into such relevant issues as the employee turnover that occurred at Lundy during the Board's delay." Pet. App. 27a. Strikingly, in the decision cited by the court in support of that suggestion, the court remanded the case to the Board to make that inquiry in the first instance. *Long Island College Hospital*, 310 N.L.R.B. 689 (1993), enforcement denied, 20 F.3d 76 (2d Cir. 1994); see also *NLRB* v. *Children's Hosp. of Michigan*, 6 F.3d 1147, 1153 (6th Cir. 1993) (noting that reviewing courts are not authorized to take evidence and cautioning against the consideration of employer claims of employee turnover and the like that were not supported by evidence introduced in the record before the Board); *NLRB* v. *Joclin Mfg. Co.*, 314 F.2d 627, 635 (2d Cir. 1963) (Friendly, J.) (leaving it to the Board to decide in the first instance whether "in view of the lapse of time, a new election, with a more clearly defined bargaining unit, * * * would serve the purposes of the statute more fully than further inquiry into this old and at best exceedingly close one").



Board promptly to tabulate the challenged ballots and redetermine the validity of its prior certification of the Union as the exclusive bargaining representative.[17] The court's subsequent orders of February 15 and March 21 frustrated the reasonable expectations that its own opinion created and showed little regard for the investment of time, emotion, and money that numerous directly affected private parties put into the election.

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[17] Because the Board's tabulation of the challenged ballots would have occurred pursuant to a familiar procedure and would not have consumed a significant amount of time, this is not a case in which a remand would have amounted to a new and unforeseen lawsuit being superimposed on an already protracted proceeding. See *NLRB* v. *Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 707-711 (7th Cir. 1976) (declining to remand in such a situation).

## CONCLUSION

The petition for a writ of certiorari should be granted and the orders of the court of appeals precluding the Board from conducting further proceedings in the representation case should be summarily reversed.

Respectfully submitted.

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